



March 15, 2013

The Honorable Pete Kelly, Co-Chair
The Honorable Kevin Meyer, Co-Chair
The Honorable Anna Fairclough, Vice-Chair
Senate Finance Committee
Alaska State Senate
State Capitol, Room 532
Juneau, AK 99801

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via email: Sen.Pete.Kelly@akleg.gov
Sen.Kevin.Meyer@akleg.gov
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**Re: CS Senate Bill 56 – Adjusting the Grading
of Minor Drug Offenses
ACLU Letter of Support**

Co-Chair Kelly, Co-Chair Meyer, Vice-Chair Fairclough:

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. In that regard, we appreciate the opportunity to provide the Committee with our review of the proposed legislation.

We would be happy to work with the Committee to answer any questions you may have.

Overview of CSSB 56 and the Drug Laws

The committee substitute for Senate Bill 56 would alter how drug offenses are categorized and punished. SB 56's most substantial effect would be to change the laws on drug possession so that most drug offense possessions would be misdemeanors, provided that the offender did not have a substantial history of drug possession offenses and did not possess more than a small amount of drugs.

The drug offense laws are written in a very elaborate way, which can be hard for a lay person to understand. While as lawmakers you are probably familiar with the structure of the statutes, a brief guide may help other readers. Most drugs are divided into a “schedule” of classifications: most opiate drugs, like heroin or oxycontin, are in Schedule IA; cocaine, most hallucinogens, and PCP are in Schedule IIA; hashish is in Schedule IIIA; most steroids are in Schedule VA; and marijuana is in Schedule VIA. *See* AS 11.71.140-190.

The enforcement statutes, AS 11.71.010-060, define six categories of drug offenses. Each offense is called “misconduct involving a controlled substance,” (abbreviated “MICS” and pronounced like “mix”) and then labeled as in the first through sixth degrees. Those offenses range in seriousness, with MICS in the first degree being the most serious (selling heroin or cocaine to a child), and MICS in the sixth degree being the least serious (possession of a small amount of marijuana). Those offenses are further abbreviated with the number of their grading; “misconduct involving a controlled substance in the fourth degree” is thus a “MICS 4” (pronounced “mix-four”).

Currently, *any* possession of *any* amount of a Schedule IA drug or most Schedule IIA drugs are felony offenses, misconduct involving controlled substances in the fourth degree. AS 11.71.040(a)(3). Under SB 56, the basic offense of possessing a Schedule IA or Schedule IIA substance would become a misdemeanor. However, SB 56 would make *repeated* drug possession offenses a felony (where the individual has at least two prior drug convictions in the last five years). SB 56 would also allow felony charges when the individual carries more than 15 vials or tablets of a Schedule IA or IIA drug, more than 3 grams of a Schedule IA or IIA drug, or more than 300 milligrams of heroin or LSD.

Under SB 56, the remaining drug possession offenses involving Schedule IA and IIA drugs would become a misdemeanor – misconduct involving a controlled substance in the fifth degree.

Prosecuting Drug Possession as a Felony Is Expensive and Bad Public Policy

What’s the difference between a felony and a misdemeanor? About four years. Someone convicted of MICS in the fourth degree, a C felony, can be sent to prison for up to five years. AS 12.55.125(e). Someone convicted of MICS in the fifth degree, an A misdemeanor, can be sent to prison for a year. AS 12.55.135(a). Since the cost of imprisonment is running almost \$50,000 a year in Alaska, the committee will probably be hard-pressed to think of a case, not otherwise covered by SB 56, where the state should spend a quarter-million dollars to incarcerate someone for mere possession of a small amount of drugs.

Nationwide, 18% of all felony convictions—almost one in five—in state courts in 2004 were for drug possession (not trafficking or sale).¹ In 64% of those drug possession cases, the person

¹ Bureau of Justice Statistics, U.S. Dep’t of Justice, *State Court Sentencing of Convicted Felons 2005*, Table 1.1 *available at* <http://bjs.gov/content/pub/html/scscf04/tables/scs04101tab.cfm>.

convicted was sentenced to a term of incarceration.² Of those convicted of a drug possession felony and sentenced to incarceration, the average sentence was 23 months.³ As a nation, we are investing enormous resources and wasting the lives of many citizens trying to fight the substance abuse problem with prison time.

According to the Alaska Department of Corrections' last census, the largest number of prisoners serving time on drug offenses are those serving time on MICS 4 sentences.⁴ 168 of the 401 prisoners in custody at the time of the last prison census were serving time either on MICS 4 or attempted MICS 4 offenses.⁵ More prisoners were serving time on MICS 4 sentences than for sexual abuse of a minor in the first degree.⁶ Is that how we want to prioritize scarce and expensive criminal justice resources?

Substance abuse is a serious problem in Alaska; no one can deny that. However, the question before the committee is how we *address* the substance abuse problem, not whether it is serious or not. To date, after 40-plus years of the War on Drugs, no state has successfully incarcerated its way out of the substance abuse problem. We do not anticipate that trend changing soon.

Experts in substance abuse treatment and, increasingly, the general public see long-term incarceration of those merely possessing drugs as wasteful, ineffective public policy. Increased resources for substance abuse treatment programs, treatment courts, and public education are important, useful alternatives to trying to solve the drug problem through the prison system.

The core of our criminal justice system has long been to punish acts directly harming other people: murder, assault, rape, robbery, and kidnapping. We punish those acts most severely because they both result in serious harm to others and because they are done out of malice towards others. Those two core concepts, a bad act and a bad mindset, are the elements of a crime. We differentiate between cold-blooded murder and a death in a car accident because we

² *Id.*, Table 1.2, available at <http://bjs.gov/content/pub/html/scscf04/tables/scs04102tab.cfm>.

³ *Id.*, Table 1.3, available at <http://bjs.gov/content/pub/html/scscf04/tables/scs04103tab.cfm>.

⁴ Of course, not *all* MICS 4 offenses involve the simple possession of a Schedule IA or IIA substance, thus the numbers are probably somewhat overinclusive. On the other hand, these numbers are also underinclusive, as the statistics also do not address the large number of prisoners in custody for violating the terms of the probation or parole, who may well contain large numbers of prisoners originally arrested for minor drug offenses.

⁵ Department of Corrections, State of Alaska, 2012 Offender Profile, at 14, available at http://www.correct.state.ak.us/admin/docs/2012Profile07_FINAL.pdf.

⁶ *Id.* at 14, 17.

think that only crimes committed with that bad mindset, that malice towards someone else, merit the most serious punishment.

Drug use certainly imposes costs on society, on others, and on families. However, that harm is *indirect*, in its secondary effects on others. *Indirect* harms are only rarely punished by the criminal justice system and rarely punished seriously. More importantly, a drug user does not take drugs specifically intending to hurt his family or disappoint his co-workers or drive up health insurance costs; while he may be aware of these effects generally and be indifferent to them, most people would agree the typical drug user does not use drugs *maliciously*.

Instead, drug possession laws were enacted with harsh penalties because many people believed that harsh penalties would deter people from using drugs. 40 years later, history has answered that question with a resounding “no.” Harsh drug possession penalties have not been effective in keeping people from using drugs, and virtually no expert in the field of substance abuse would claim that harsh criminal penalties for drug possession has been effective.

In Alaska, we have a terrible substance abuse problem. We have a terrible substance abuse problem, despite the fact that we’ve been treating simple drug possession as a felony since the 1980’s. If we keep doing exactly what we’ve been doing, we should probably expect the same results to continue. Bills like SB 56 that cut correctional costs and make room for better and more effective treatment of substance abuse problems are part of the way to change things for the better.

Building more jails isn’t going to make anybody sober.

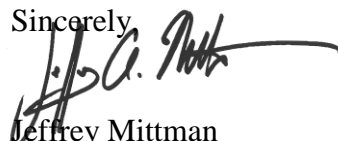
Conclusion

We hope that the Senate Finance Committee will note our support for SB 56.

Please feel free to contact the undersigned should you require any additional information. Again, we are happy to reply to any questions that may arise either through written or verbal testimony, or to answer informally any questions which Members of the Committee may have.

Thank you again for the opportunity to share our concerns.

Sincerely,



Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: The Honorable Mike Dunleavy, Sen.Mike.Dunleavy@akleg.gov
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